No. 89-1994

IN THE

Supreme Court of the United States

October Term, 1989

ROLAND MASTANDREA, *et al.*,
Petitioners,

vs.

THE NEWS HERALD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF CORPORATE AFFILIATION

The Lake-Geauga Printing Company, at the time of this incident, was a privately held company with all of its stock owned by the Ashtabula Printing Company of Ashtabula, Ohio. The Ashtabula Printing Company was a privately owned corporation, whose stock was totally owned by the Rowley Family of Ashtabula County, Ohio.

Since the inception of this case, the Lake-Geauga Printing Company assets and the Ashtabula Printing Company assets were sold, and both companies were dissolved, together with the stock and said companies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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STATEMENT OF FACTS

In this defamation lawsuit, a public official seeks to place a newspaper on trial because it published an article of public interest concerning the outcome of proceedings conducted by the Ohio Elections Commission regarding the propriety of petitioner Roland Mastandrea's actions while campaigning for Mayor of Willoughby, Ohio.

In November of 1983, petitioner was an elected city councilman for the City of Willoughby. He was also running for mayor of Willoughby during this time period, but ultimately lost the November 9, 1983 election to incumbent Mayor Eric Knudson. The week before the election an unsigned flyer entitled *Wake Up Willoughby* was distributed throughout Willoughby (*Wake Up Willoughby* flyer, p. A41, Appendix to Petition for Writ of Certiorari). Mayor Knudson and his supporters became upset with *Wake Up Willoughby* which they termed a "smear" flyer. A substantial public debate followed, which was extensively reported on by the *Lake County News-Herald*, published by co-respondent Lorain Publishing Company. Ultimately, Mayor Knudson and other council members filed a complaint against petitioner with the Ohio Elections Commission regarding the unsigned flyer.

On May 10, 1984, the Commission conducted a ten hour hearing which resulted in a 412 page transcript.

The Commission's hearing was brought pursuant to Chapter 3599, Ohio Revised Code, and the precise legal question before the Commission was whether petitioner had violated Ohio election laws.

Throughout the petitioner's brief, the assertion is made that the Ohio Elections Commission can only determine whether there is "probable cause" that the election laws were violated. This is not a completely accurate statement of the law. Under Ohio election law, the Elections Commission determines whether there was a violation of the Ohio election laws, not merely whether there was "probable cause." As set forth in the Affidavit of Commissioner Harry J. Lehman attached to respondent's Motion for Summary Judgment:

> 4. In May, 1984, the Elections Commission's authority was limited to dismissing claims of violations of the elections laws, or referring the matter for prosecution. There was no middle ground. (The General Assembly has since amended Section 3599.091 to authorize the Commission to impose fines for violations.) As a result, it was the practice of members of the Commission, including affiant, not to vote to refer a matter to a county prosecutor unless a majority of the Commission was convinced, based upon the record made at the hearing, that there was a violation of the statute, as distinguished from 'probable cause' of a violation.

This accurately sets forth Ohio law.[1]

Following the taking of testimony, the Commission unanimously concluded that the petitioner had violated Ohio election laws. A review of the transcript demonstrates that the Commission had no lack of

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[1] See Ohio Revised Code Sections 3517.14 and 3599.091 which refer not to probable cause, but to the Commission finding "violations."

As is set forth in *DeWine v. Ohio Elections Commission*, 61 Ohio App. 2d 25, 30, 399 N.E.2d 99, 103 (Court of Appeals Franklin County, 1978):

> Pursuant to R.C. 3599.091(C), the function of the defendant Ohio Elections Commission is: (1) to receive sworn complaints alleging violations of R.C. 3599.11; (2) to conduct an investigation of the charges; (3) *to make a finding as to whether or not a violation has occurred*; and (4) if a violation be found, to transmit a copy of its findings and the evidence to the prosecution attorney of the appropriate county. R.C. 3599.091(C) merely confers on the Ohio Elections Commission the power to make a factual determination as to whether the statute has been violated. (Emphasis supplied.)

enthusiasm for the conclusion it had reached. The following is recorded at transcript, Volume II, pp. 213, 214, 215 and 216:

> Madam Chairman: The meeting will reconvene. I call on Commissioner Lehman.
>
> Madam Chairman, having considered the testimony and reviewed the documentary evidence, I would deal with the issues by way of two motions. *First, I would move that we find a violation of Section 3599.09 by the respondent* with respect to the writing, printing, posting or distributing or causing to be written, printed, posted or distributed Exhibit 1 which is the "Wake Up Willoughby." I think that is all we have to do. I will discuss the motion if there is a second.
>
> Madam Chairman: Is there a second to that Motion?
>
> Ms. McFadden: I will second.
>
> Madam Chairman: Discussion?
>
> Mr. Lehman: Well, it is fairly clear from the evidence that we have before us on this matter, to me, that *the respondent was involved in the writing, printing in the technical sense and more likely than not distribution of this piece.* I do not find that—I have to use negatives because that is the way the statute was written—that it was not willfully done and I cannot say that it did not affect the outcome of the election significantly at least as it affects two councilmen and the Mayor's race.
>
> It may have affected the outcome of the election significantly for Mayor in the negative manner, but the way the statute reads, it could have significantly affected that and that is why I make the motion.
>
> Madam Chairman: Additional discussion?
>
> (No response.)

Madam Chairman: Are you prepared to vote?

Mr. McNichols: Yes.

Madam Chairman: All in favor please say "Aye."

(Thereupon, the "Ayes" were heard.)

Madam Chairman: Opposed, "Nay"?

(No response.)

Madam Chairman: The motion carries unanimously.

Mr. Lehman: *I would next move, Madam Chairman, that the Commission find a violation of 3599.091(B)(10)* with respect to the content of the "Wake Up Willoughby" literature used in the campaign, what is attached to the affidavits and otherwise identified as Exhibit 1, in that it contains both, in my opinion, based upon the record, false statements or statements made with reckless disregard of whether they were false.

Mr. Blackburn: Second.

Madam Chairman: Is there a discussion?

(No response.)

Madam Chairman: Are you prepared to vote?

Mr. McNichols: Yes.

Madam Chairman: All in favor please say "Aye."

(Thereupon, the "Ayes" were heard.)

Madam Chairman: Opposed, 'Nay"?

(No response.)

Madam Chairman: The motion carries unanimously.

At that point Donald McTigue, staff counsel for the Commission, made the following statement to those in attendance:

> Just for clarification, those people who are not as familiar with the motions that the Commission makes, *the import here is that the Commission has found violations under both statutes* which cause the Commission by the statute to refer both violations to the County Prosecutor; therefore, they will be referred.

Telegraph reporter Geoffrey Haynes had been subpoenaed by petitioner to testify on petitioner's behalf and was present throughout the lengthy proceedings. He returned to *The Telegraph* office, arriving there at about 2:00 a.m. and wrote the article immediately while the events of the previous day were still fresh in his mind, and so as to have the article available for publication prior to the next day's early morning deadline. On May 11, 1984, *The Telegraph* published the article authored by Mr. Haynes entitled "Mastandrea Guilty in Willoughbygate." The article recounts in summary form the events of the hearing and the Commissioner's determination that Mr. Mastandrea had violated Ohio election laws with reference to the writing and distribution of the *Wake Up Willoughby* flyer.

Taking exception to the use of the word "guilty" and a statement in the body of the story that "the court" (rather than "the commission") refused to admit a tape in evidence, petitioner brought suit against Rowley Publications, publisher of the *Lake County Telegraph*, and its reporter, Geoffrey Haynes.

Mr. Haynes testified that he wrote that petitioner had been found "guilty" because that was his understanding as to what the Commission had ruled. On this point he testified as follows:

Q. You said 'Mr. Roland J. Mastandrea was found guilty,' what did you mean by that?

A. That that's what the commission had ruled.

(Haynes deposition, p. 27, lines 18 through 20)

Q. As far as you knew, he was guilty as determined by the Election Commission?

A. That's correct.

(Haynes deposition, p. 30, lines 5 through 7)

Mr. Haynes further testified as follows:

Q. I would like for you to try and recall for us, if you would, your state of mind at the time you published each of the respective articles that are the subject of the cause of action against you. I think I'm referring specifically to Deposition Exhibits 9 and 10.

Sir, at the time that you wrote either of those articles, did you have any knowledge that any of the things contained in either article was false?

A. No, sir.

Q. Did you believe everything contained in both articles to be true prior to each respective publication?

A. Yes, sir.

Q. Did you, sir, entertain any serious doubts as to the truth or falsity of anything in either article immediately prior to each article's publication?

Mr. English: Objection.

A. No, sir.

(Haynes deposition, pp. 54-55, lines 17 through 8)

The trial court granted summary judgment for all defendants and, after an independent review of the record, the Court of Appeals affirmed the rulings on the basis that plaintiffs failed to prove with convincing clarity that the challenged articles were published with actual malice. The Ohio Supreme Court denied review. This case is now before this Court on plaintiff's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE OHIO SUPREME COURT IN THIS MATTER DOES NOT CONFLICT WITH DECISIONS OF OHIO'S COURTS OR THE SUPREME COURT OF THE UNITED STATES BUT MERELY RESTATES WELL ESTABLISHED "BLACK LETTER" LAW AS RESPECTS A PUBLIC OFFICIAL'S BURDEN IN A DEFAMATION ACTION.

This case very simply involves the application of a principle of law which has been well defined and specifically stated by both the Ohio Supreme Court and the United States Supreme Court. The respondent respectfully submits that nothing will be gained in terms of guidance to the federal courts or Ohio's courts as a result of the court reviewing this case involving yet another defamation action regarding a public official.

The degree of the burden placed upon a public official attempting to withstand a defendant's motion for summary judgment in a libel action has been specifically stated and is well established in Ohio law as follows:

> In order to withstand defendant's motion for summary judgment in a libel action brought by a public official, the plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity.

Bukky v. Lake-Geauga Printing Co., 68 Ohio St. 2d 45 (1981), *reaffirmed, see Grau v. Kleinschmidt*, 31 Ohio St. 3d 84, 90 (1987). *Varanese v. Gall*, 35 Ohio St. 3d 78 (1988), *cert. denied*, 487 U.S. 1206 (1988).

The Ohio Supreme Court's holdings are consistent with the rulings of the United States Supreme Court, in that to defeat a defendant's motion for summary judgment in a defamation action a public official cannot merely present facts which raise *some* issue of fact; rather a public official must present substantial facts of sufficient persuasive value that would:

> . . . allow a rational finder of fact to find *actual malice* by *clear and convincing evidence.*

Anderson v. Liberty Lobby, Inc., 477 U.S. _____, 91 L. Ed. 2d 202, 215 (1986).

This was the law that was applied by the Court of Appeals. As the Court stated:

> Appellants have failed to establish 'actual malice' with 'convincing clarity' and their assignment is therefore not well taken.

(Appendix to Petition for Writ at A35).

The burden of the petitioner in this matter in order to overcome defendant's Motion for Summary Judgment was succinctly and accurately stated by the Court of Appeals in a manner that is consistent with both the previous decisions in Ohio's courts as well as the United States Supreme Court.

II. A PUBLIC FIGURE RETAINS THAT STATUS AND MUST PROVE ACTUAL MALICE IN THE PUBLICATION OF ALLEGEDLY DEFAMATORY STATEMENTS ABOUT HIM EVEN THOUGH HE NO LONGER HOLDS THAT POSITION OR STATUS, IF THE STATEMENTS ARISE FROM ISSUES DIRECTLY RELATED TO HIS PRIOR STATUS OR POSITION.

Petitioner does not dispute that he was an elected public official as a Ward 3 councilman from November 1981 to December 31, 1983. It is also undisputed that he did not seek reelection as a councilman but chose to become a candidate for mayor of Willoughby for the November 1983 elections.

There is also no question that the allegedly defamatory article reported upon proceedings before the Ohio Elections Commission, and thereby concerned itself with a report on the activities of a governmental body or agency, presenting a discussion on a public issue or controversy. What petitioner does attempt to dispute is his status as a "public official" and/or "public figure" at the time of the publication of the article in question.

Petitioner relies heavily on the fact that he had not held or sought public office for six months prior to the publication of the article. The Ohio Supreme Court addressed this precise issue in *Scott v. News Herald*, 25 Ohio St. 3d 243 (1986). Scott was a retired superintendent of schools, who became embroiled in a dispute arising from an interscholastic athletic event. This dispute led to proceedings before a voluntary association and subsequent litigation. The allegedly defamatory material concerned itself with those proceedings.

Although Scott was retired and no longer a "public official" at the time of either the legal proceedings or the publication of the article, the Court found he was nevertheless a "public official" for purposes of the application of defamation law:

> Appellant's retired status at the time of the legal hearing is thus not germane because the averred defamatory remarks were made in the course of actions arising from official conduct that were, most importantly, matters of import to the community's legitimate interest in a public official's performance of public responsibilities ... [u]nder Ohio's Constitution ... the subsequent retirement of an individual does not diminish his or her status with respect to the discussion and debate of issues related to a prior status or position.

Scott at 247, n.2. *Scott* is directly on point with this case and has been consistently applied by the Courts of Appeals of Ohio. The Court of Appeals for the Eighth Appellate District applied *Scott* to find that a police officer retired from the Shaker Heights Police Department for one year prior to an allegedly defamatory broadcast retained his status as a public official in connection with an investigation with improprieties during his tenure on the police force. *Mueller v. Storer Communications, Inc.*, 46 Ohio App. 3d 57 (1988).

It is important to note that petitioner's actions, which were the subject of the allegedly defamatory article, took place while he was an elected public official and during his candidacy for mayor. His status as a "retired" city councilman and a defeated candidate for mayor does not diminish or eliminate his status with respect to discussion and debate of issues related to his conduct as a public official. *His improper actions took*

place while he was an elected official and are directly related to his campaign for mayor. Therefore, the conduct and actions of petitioner addressed in the May 11, 1984 article, besides being a legitimate matter of public interest, are inseparably tied to his conduct as an elected public official and as a candidate for mayor.

The Court of Appeals correctly applied the holding in *Scott v. News Herald* to find that at the time the May 11, 1984 article was published, petitioner retained his status as a public official and/or public figure. Petitioner has failed to present an issue warranting this Court's review.

III. THE ARTICLE WAS NOT DEFAMATORY, WAS A SUBSTANTIALLY ACCURATE ACCOUNT OF THE PROCEEDINGS OF THE ELECTIONS COMMISSION AND IS PROTECTED BY THE FAIR REPORT PRIVILEGE.

Petitioner attached to his Petition a copy of the complained of article. The Court of Appeals, citing *St. Amant v. Thompson*, 390 U.S. 727 (1986) and *Varanese v. Gall*, 35 Ohio St. 3d 78, 81 (1988), determined that the article was offered to show the contents of the article and not to prove actual malice since "no contention is made, and none could be made, that the allegations in the ad are 'so inherently improbable that only a reckless man would have put them in circulation.' " (Petition Appendix at A16).

The Court went on to point out that the article was a report of the proceedings of the Elections Commission's determination of charges that had been brought against a councilman who was a candidate for mayor. This was a matter of public concern, at least to the citizens of Willoughby. The Court went on to state as follows:

> However, it is very arguable that the article was in fact a fair and substantially accurate account of the proceedings. The appellants allege the article implied that Mastandrea was found guilty of 'Willoughbygate' by a court. Appellants' claim stems from the single use of the word 'court' in the article when Haynes wrote 'The court refused to accept the tape as evidence ***' In all other instances the commission was correctly labeled. Furthermore, the commission does act in a quasi-judicial mode in a probable cause hearing. As was previously noted, the commission did determine that the finding of 'misstatements' by Mastandrea constituted two violations of the elections laws.

> These secondary facts do not change the import of the story or substantially alter the substance of the story. Finally, the matter was referred for further prosecution, even though it was ultimately 'no billed' by the Lake County Grand Jury. Therefore, looking at the article as a whole, it accurately reflects the substance of the proceedings. Therefore, this article is also protected by the 'fair report' privilege.

(Appendix to Petition at A33).

It is submitted that not only is the article not defamatory, it is a fair and substantially accurate account of the proceedings of the Elections Commission and petitioner has demonstrated not even the slightest amount of the requisite malice.

CONCLUSION

For the foregoing reasons, respondent urges the United States Supreme Court to deny the instant Petition.

Respectfully submitted,

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